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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-994

EL PASO NATURAL GAS COMPANY,
Petitioner,

vs.

STATE OF ARIZONA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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STATE OF ARIZONA, et al.,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

The petitioner, El Paso Natural Gas Company, respectfully requests that a writ of certiorari issue to review a judgment of the Supreme Court of Arizona in this case.

OPINION BELOW

The opinion of the Supreme Court of Arizona (Appendix A) is reported at _____ Ariz. _____, 599 P.2d 175 (1979).

JURISDICTION

The judgment of the Supreme Court of Arizona was entered on June 19, 1979. A timely petition for rehearing was denied on September 6, 1979. On November 26, 1979, Mr. Justice Rehnquist entered an order extending petitioner's time to file this petition to and including December 28, 1979. This petition is filed within the time

permitted, as so extended. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court of Arizona denied petitioner's right to procedural due process by applying the doctrine of res judicata to a prior judgment entered in a case in which petitioner was neither a party nor represented.

2. Where a taxpayer unsuccessfully sues, not in a representative or class capacity, but on its own behalf, to recover a money judgment for *ad valorem* taxes illegally collected by a state, is due process violated if the adverse judgment is held to bar, as res judicata, the refund claim of another taxpayer on the ground that it was virtually represented by the plaintiff in the first case?

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1975 petitioner El Paso Natural Gas Company

(El Paso) filed this suit for the recovery of *ad valorem* property taxes illegally collected by the State of Arizona for the year 1970. The named defendants included the State of Arizona, tax officials of the state, each county in the state, and the various county treasurers who, pursuant to Arizona law, levy and collect the *ad valorem* property taxes attributable to the state tax rate on property in their counties. Appendix B contains a complete list of the defendants, now respondents. El Paso owned property in and paid taxes to each county.

The complaint alleged that two legislative appropriations funded by the 1970 state tax rate violated various provisions of the Arizona Constitution and statutes, and sought the recovery of $990,659.23, the amount of taxes paid under protest by El Paso attributable to the funding of the illegal appropriations through the state tax rate. No injunctive or declaratory relief was requested.

At the time suit was filed, there was pending a similar action by Arizona Public Service Company, *State v. Arizona Public Service Co.*, 24 Ariz. App. 601, 540 P.2d 727 (1975), *appeal dismissed*, 426 U.S. 931 (1976) (hereafter *APSCO*) (Appendix C). It is the application and enforcement by the Arizona Supreme Court of the *APSCO* judgment against El Paso, under the doctrine of res judicata, which El Paso contends constitutes a violation of the Due Process Clause of the fourteenth amendment of the United States Constitution.

Arizona Public Service had sought a money judgment refunding taxes illegally collected from it, and did not claim to represent any other taxpayers. Defendants' motion for judgment on the pleadings was denied. Upon subsequent cross-motions for summary judgment, the trial court ruled that the appropriations were invalid, and entered

judgment in favor of Arizona Public Service in the amount of $1,789,894.31. The state and the other defendants appealed, asserting that their motion for judgment on the pleadings should have been granted on the basis of *Cochise County v. Southern Pacific Co.*, 99 Ariz. 385, 409 P.2d 549 (1966), in which the Supreme Court of Arizona had held that in an action to recover a tax illegally collected, the taxpayer must prove that the resulting tax rate "was so grossly excessive as to show it was arbitrary or fraudulent." *Id.* at 393, 409 P.2d at 555.

Arizona Public Service contended that this rule applied only to valuation or other cases involving ministerial or discretionary actions, and could not apply to the taxes in question, since they were unconstitutional and illegal.

The Arizona Court of Appeals agreed with the position of Arizona Public Service but reversed, stating that: "[Arizona Public Service's] position is logically sound. . . .", but that it was bound by the Arizona Supreme Court decision in *Cochise County*, since the court of appeals has no "power to overrule Supreme Court decisions. . . ." 24 Ariz. App. at 604-605, 540 P.2d at 730-731. The court of appeals concluded:

> "Pursuant to the holding in *Cochise v. Southern Pacific, supra*, we hold that APS having failed to allege and prove that the alleged unconstitutional appropriation resulted in an excessive tax rate so as to be fraudulent or arbitrary, its complaint should have been dismissed." *Id.* at 605, 540 P.2d at 731.

See also 599 P.2d at 177.

At this point El Paso filed a motion with the court of appeals seeking leave to file a brief as *amicus curiae*

in support of Arizona Public Service's motion for rehearing. Both motions were denied. Thereafter Arizona Public Service's petition for review by the Supreme Court of Arizona was denied, and an appeal to this Court was dismissed.

Following the decision of the court of appeals El Paso amended its complaint to conform with *APSCO* to allege that the state tax rate resulting from the invalid appropriations was so excessive as to be fraudulent or arbitrary. The defendants answered the amended complaint, but did not assert res judicata as an affirmative defense, as required by Rule 8(d) of the Arizona Rules of Civil Procedure, 16 Ariz. Rev. Stat.

The parties filed cross-motions for summary judgment, and the trial court entered judgment in favor of the defendants and against El Paso. The decision was based upon the merits of El Paso's challenges to the appropriations, and did not refer to the doctrine of res judicata or the *APSCO* opinion.

In its briefs on appeal, El Paso urged the court of appeals to reconsider and overrule *APSCO*, as well as asserting that the tax was so excessive as to be aribtrary or fraudulent, to comply with the *APSCO* decision.

The defendants' reply brief asserted that the trial court's decision was correct as a matter of law, and further claimed that the *APSCO* judgment was res judicata as to El Paso's claim for a tax refund.

In reply, El Paso demonstrated that such an application of *APSCO* would violate due process.

The case was transferred to the Supreme Court of Arizona, and set for oral argument.

The doctrine of virtual representation had not been mentioned in the briefs, but two days before oral argument the defendants filed with the court, as a supplemental authority, a copy of the opinion in *Gist v. Stamford Hospital District,* 557 S.W.2d 556 (Tex.Civ.App. 1977), *cert denied,* 439 U.S. 822 (1978). This was the first suggestion that El Paso had been represented by Arizona Public Service in *APSCO,* so it had no opportunity to brief the point until its motion for rehearing.

In its judgment affirming the trial court (Appendix A), the Supreme Court of Arizona considered neither the merits of El Paso's claim, nor the findings of fact and conclusions of law of the trial court. Instead, the court held:

1. That its decision in *Cochise County* was erroneous in holding that a taxpayer had to prove that an illegal tax rate was so excessive as to be arbitrary or fraudulent.

2. That the decision of the court of appeals in *APSCO,* having been based on *Cochise County,* was therefore also erroneous.

3. That although erroneous, *APSCO* was a "final judgment on the merits" for purposes of res judicata.

4. That petitioner, although not a party to the *APSCO* decision, was nevertheless bound thereby under the doctrine of virtual representation, and therefore precluded by the rules of res judicata from relitigating the issues decided or which could have been raised in *APSCO.*

El Paso then filed a timely motion for rehearing (Appendix D). The motion again raised the due process issue.

The Supreme Court of Arizona entered its order denying the motion for rehearing without opinion on September 6, 1979 (Appendix E).

An application for an extension of time has been granted, extending petitioner's time in which to file this petition to and including December 28, 1979. This petition is filed within the time permitted by law, as so extended.

REASONS FOR GRANTING THE WRIT

1. The opinion below is contrary to and in disregard of all prior decisions of this Court dealing with the limitations imposed by the due process clause on the application of res judicata to persons not parties to an action.

Due process imposes certain requirements which must be met before a judgment in a class or representative action may bind persons similarly situated to a party in that suit. First, a class or representative action must be commenced and conducted as such, by the named party for and on behalf of himself and others similarly situated, and the court must recognize the plaintiff's representative status. Second, there must be the best notice practicable to those similarly situated. Third, even where these two prerequisites have been met, a person claimed to be bound must have an opportunity to show that he was not adequately represented, or did not receive adequate notice, and therefore is not bound by the judgment.

The first of these requirements was established by this

Court in *Hansberry v. Lee,* 311 U.S. 32 (1940), the seminal case on the strictures imposed by due process upon the application of the doctrine of res judicata to judgments in class or representative actions. The Court began its analysis by reiterating the basic principle that a person is not bound by a judgment rendered in a case in which he was not a party or served with process, and expressly held that judicial action enforcing such judgment against a nonparty violates the due process guaranteed by the fifth and fourteenth amendments. *Id.* at 40-41.

However, the Court went on to state:

> "To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it." *Id.* at 41 (citations omitted).

Recognizing that due process is a fluid principle, this Court refused to adopt any particular rule binding upon the states for the establishment of the conclusiveness of judgments in class or representative suits. *Id.* at 42. The Court stated:

> "Nor do we find it necessary for the decision of this case to say that, when the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact or law, a state could not constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all, *provided that the procedure were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.*" *Id.* at 43 (emphasis supplied).

Thus *Hansberry* sets the first requirement which must be met before a state may give preclusive effect to a judgment in a class or representative suit against a nonappearing member of the putative class: The court rendering the first judgment must have determined that the party before the court purported to represent a class of persons similarly situated, that the party was a typical member of such a class, and that the party would adequately represent the interests of the nonappearing members of the class.

This requirement applies to all class or representative actions, and has been incorporated for federal class actions in Rule 23 of the Federal Rules of Civil Procedure. The requirements of Rule 23 "seem plainly intended to meet the standard established by the Supreme Court in . . . *Hansberry v. Lee,* to the effect that persons not parties to an action may be bound by a judgment whenever the procedure adopted 'fairly insures the protection of the interests of absent parties who are to be bound by it.'" 7A Wright & Miller, *Federal Practice and Procedure,* § 1789, p. 179 (1972) (footnotes omitted).

These standards are also recognized in the most recent draft of the *Restatement of the Law* dealing with this issue. *Restatement (Second) of Judgments* § 85(1)(e), p. 56-57 (Tent. Draft No. 2, 1975), provides that a nonparty to an action is subject to the rules of res judicata on the basis of a judgment in that action if he was represented by a party who was "The representative of a class of persons similarly situated, designated as such with the approval of the court. . . ." And the comment to that subsection provides that the representative of the class derives his authority from his status as a member of the class, "coupled with judicial approval of designation of the action as a

class suit and of the representative's status as such." *Id.*, Comment e, p. 63.

These preliminary requirements, which must be met in the earlier action for it to be considered as a class or representative suit, have been consistently applied by the courts ruling on the issue. Preclusion has been flatly denied where the similarly situated parties in the first suit appeared only in their individual capacities and not as representatives of a judicially recognized class. *Pollard v. Cockrell,* 578 F.2d 1002, 1009 (5th Cir. 1978); *E. B. Elliott Adv. Co. v. Metropolitan Dade County,* 425 F.2d 1141, 1148 (5th Cir.), *cert. denied,* 400 U.S. 805 (1970). The same result was reached where the first and second suits involved identical wrongful death claims arising out of the same accident, even though the cases had been consolidated for pretrial discovery. *Humphreys v. Tann,* 487 F.2d 666, 671 (6th Cir. 1973), *cert. denied,* 416 U.S. 956 (1974). Preclusion of nonparties has also been denied on the basis of suits which were commenced as class actions under Rule 23, but where the trial court, before rendering judgment, either failed to consider the question of the certification of the named plaintiffs as representatives of a class, or expressly rejected the adequacy of the named plaintiffs to represent the class. *United States v. East Baton Rouge Parish School Board,* 594 F.2d 56, 58-59 (5th Cir. 1979); *United States v. State of Texas,* 430 F.Supp. 920, 926 (S.D. Tex. 1977) (three judge panel); *Roberts v. American Airlines, Inc.,* 526 F.2d 757, 761 (7th Cir. 1975), *cert denied,* 425 U.S. 951 (1976); *City of Hueytown v. Burge,* 342 So.2d 339, 344 (Ala. 1977).

In fact, preclusion has been denied even where the plaintiff in the first case was certified as a class representative, but only as to a limited class which did not include

the plaintiffs in other pending lawsuits, despite the facts that the suits had been consolidated for pretrial discovery, the complaints were identical, all of the plaintiffs' attorneys had worked closely together and filed joint motions, and the precise legal issue as to which preclusion was sought had been decided after a full trial and affirmed on appeal. *In re Nissan Motor Corporation Antitrust Litigation,* 471 F.Supp. 754, 759 (S.D.Fla. 1979). The court in the last cited case also expressly rejected the defendants' attempt to have the court make an *ex post facto* determination that the other plaintiffs had been adequately represented in the first suit, stating that such a procedure would violate the principles set in *Hansberry. Id.*

The second requirement, dealing with the notice required in class or representative actions, is established by *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). That case considered the binding effect which could constitutionally be given to a judicial decree settling the accounts of the trustee of a common trust fund as against nonappearing members of a class consisting of those persons who claimed an interest in the income of any of the consolidated trusts. The New York statutes creating the procedure in question took cognizance of *Hansberry's* requirement that the absent members of the class have a representative in the suit, by requiring the court considering the account to appoint a special guardian and attorney for all nonappearing persons who had or might have any interest in the income.

The guardian pursued to this Court his challenge to the trial court's jurisdiction to enter a decree binding the class of income beneficiaries on the basis of notice by publication in a local newspaper. This Court reversed the judgment as to those income beneficiaries whose names

and addresses were known to the trustee, holding that they were entitled to individual notice of the proceeding. The Court held that the Due Process Clause requires that absent members of the class be given the best notice practicable under the circumstances. *Id.* at 318-319. This determination of the type of notice required by due process depends upon the results of a balancing of the state's interest in assuring the finality of the judgments of its courts, against the individual's interest in having an opportunity to be heard. *Id.* at 313-314.

Thus, *Mullane* establishes an additional prerequisite which must be met before the judgment in a class or representative suit can bind nonappearing members of the class, even where a representative is judicially approved to protect their interests: The absent members of the class must be given the best notice practicable considering all of the circumstances.

The Court's language in *Mullane* has been incorporated in Rule 23(c)(2) of the Federal Rules of Civil Procedure which requires that, as to those class actions based upon a predominant common question of law or fact, "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

Any procedure adopted by a state to bind absent persons similarly situated must require that these prerequisites be met in the first case to satisfy *Hansberry's* "essential requisite of due process as to absent plaintiff class members, adequate representation." *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 544, 567 P.2d 1292, 1306 (1977).

Third, a mere determination that these prerequisites

were met in a previous case is not the full extent of the analysis required by due process. In addition:

> "[A]n absent member of the class, even when he is specifically identified in the judgment, will not be bound if he can establish that to affect his rights would deprive him of property without due process of law, either because the class was inadequately represented or because of a failure to give him adequate notice." Wright & Miller, *supra*, § 1789, p. 178 (footnote omitted).

In other words, while compliance with the class suit procedures required in the first case may raise a presumption that all class members were adequately represented and had adequate notice, due process requires that absent members be given an opportunity to overcome this presumption by proving that they were not in face adequately represented or did not in fact receive adequate notice.

The constitutional right of absent class members to a determination of adequacy of representation in a prior Rule 23 class action was recognized in *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973). In that case the Fifth Circuit formulated the following test:

> "To answer the question whether the class representative adequately represented the class so that the judgment in the class suit will bind the absent members of the class requires a two-pronged inquiry: (1) Did the trial court in the first suit correctly determine, initially, that the representative would adequately represent the class? and (2) Does it appear, after the termination of the suit, that the class representative adequately protected the interests of the class?" *Id.* at 72.

See also Bogard v. Cook, 586 F.2d 399, 408 (5th Cir.

1978); *Restatement (Second) of Judgments*, § 86, p. 70-71 (Tent. Draft No. 2, 1975).

While the Supreme Court of Arizona has improperly characterized this case as a "taxpayer lawsuit," this third requirement applies in true taxpayers' actions. For example, in *Blount v. City of Laramie*, 510 P.2d 294, 297 (Wyo. 1973), the court recognized the right of the plaintiffs to assert "that all members of the class were not adequately represented in the prior litigation . . . ." And, in *Seibert v. City of Columbia*, 461 S.W.2d 808, 811 (Mo. 1971), one of the cases cited by the Supreme Court of Arizona in support of its holding, the court expressly refused to preclude a group of taxpayers from challenging a city annexation on a legal basis not asserted in an earlier taxpayers' action, citing *Hansberry*.

The holding of the Supreme Court of Arizona (Appendix A) contravenes each of these constitutional requirements.

The court acknowledged that El Paso was not a party to *APSCO*, and that the application of res judicata normally requires that the parties in the second suit be indentical to the parties in the first suit. However, the court held that El Paso had, in effect, been a party to *APSCO* under the "equitable doctrine of virtual representation," which it characterized as follows: "Under that theory, commonly encountered in class actions, a judgment in favor of or against a party representing a general class operates as res judicata in favor of or against all who are thus represented." 599 P.2d at 178.

The court noted that this doctrine had been applied to litigation instituted by a taxpayer, without stopping to

analyze the particular type of taxpayers' actions in which the doctrine had been applied, and held:

> "[W]e conclude that when a taxpayer or property owner brings an action against the state or other governmental subdivision, in the absence of fraud or collusion, a judgment for or against the state or political subdivision, upon a matter of public and general interest, is binding and conclusive upon all other taxpayers and property owners similarly situated." *Id.*

The effect of this ruling on future litigants will be that when a taxpayer or property owner brings a suit against any unit of the state government on a matter which can be characterized as involving the public and general interest, that taxpayer becomes a representative of a class consisting of all others similarly situated, whether or not the plaintiff or the other taxpayers or the trial court desire or intend such a result, and all of such others are thereafter barred from litigating their similar cases, regardless of whether notice was afforded, or the representation was adequate. The only exception is when it can be proved that the judgment in the first suit was fraudulent or collusive.

The Arizona court did not, as suggested in *Hansberry*, adopt a procedure "whereby some of the members of the class could stand in judgment for all . . . ." 311 U.S. at 43.

Without the adoption of any procedure, it can only be deduced that in Arizona henceforth:

1. The plaintiff taxpayer in the first suit need not claim to represent anyone other than himself, nor will the court require that his claim be typical of those similarly situated or that he adequately represent them;

2. Notice will not be required to others similarly situated; and

3. Unless parties similiary situated can show that the first judgment was a product of fraud or collusion, they are absolutely bound, whether or not they were adequately represented in the first case or had notice of it.

The Due Process Clause has been violated in this case because *APSCO* was brought by Arizona Public Service not as a representative of a class, but solely to recover its own taxes. Petitioner was not adequately represented because the decision against Arizona Public Service was based, not on the merits, but on the ground that Arizona Public Service had failed to make an essential allegation and "therefore its complaint should have been dismissed." 24 Ariz. App. at 605, 540 P.2d at 731. And, while El Paso knew of the suit, it did not receive notice that it's refund claim was also being adjudicated.

The opinion of the Arizona Supreme Court violates the procedural rights which due process requires be afforded before a judgment may be given res judicata effect against a similarly situated nonparty. The court ignored the prior decisions of this Court and other courts regarding the due process limitations relevant to class or representative suits.

2. Unless reversed by this court, application of the opinion below in future Arizona cases will lead to violations of the due process rights of other litigants.

The preceding portion of this petition establishes that El Paso's right to procedural due process was violated

by the Arizona Supreme Court's misapplication of the *APSCO* decision as a bar to El Paso's claim for almost a million dollars of illegally collected taxes. There are other important considerations which call for the exercise of this Court's jurisdiction. One is the potential violations of due process rights by the future application of the holding.

The doctrine of virtual representation can be asserted in Arizona as a defense by the government each time any citizen sues it upon a matter which involves the public and general interest, and due to its inherent nature, almost anything the government does may be said to involve a matter of public or general interest. Under this new Arizona rule, the first final judgment rendered in any such suit will become res judicata as to all pending or future suits involving the same subject matter. And, as the court chose to employ the doctrine of res judicata rather than collateral estoppel, the first judgment will preclude the plaintiffs in the other suits from litigating any of the issues which could have been raised in the first suit, not merely those issues which were actually fully and fairly litigated.

In this regard, we note the modern trend to expand the definition of a "final judgment" for res judicata purposes. When the same plaintiff brings a second suit against the same defendant arising out of the same circumstances, his action will be entirely precluded in many situations where the actual merits of the claim were not considered in the first suit. *See* Rule 41(b) of the Federal and Arizona Rules of Civil Procedure *and Restatement (Second) of Judgments,* § 48, p. 35 (Tent. Draft No. 1, 1973).

While it may be proper for courts to expand the definition of a final judgment when only the original parties are involved, due proces requires that "increasingly

close scrutiny be given to the question of procedural fairness in binding a person who has not had an opportunity to be heard." *Restatement (Second) of Judgments*, Reporter's Memorandum, p. xii (Tent. Draft No. 2, 1975). The Arizona decision does not provide for any examination of procedural fairness. It limits relief to proof of fraud or collusion.

It does not appear that the Arizona court considered the future implications of its decision upon the rights of Arizona litigants to procedural due process in actions against their government.

3. It would be appropriate for this Court to define the scope of virtual representation at this time.

Each time a court is asked to bar the claim of a party before it on the ground that the party was virtually represented in an earlier case, the question of due process should be considered. However, many courts rest their decisions solely on authorities defining the doctrinal scope of virtual representation, a doctrine which the Fifth Circuit has observed "offers little analytical assistance [in resolving the due process issue] because of its wide and inconsistent application." *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84, 97 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977).

The Arizona decision is not an isolated case of misapplication of the doctrine of virtual representation. A number of recent decisions in cases involving suits against a government have also been based on this nebulous concept, without consideration of procedural due process. *See Gist v. Stamford Hospital District*, 557 S.W.2d 556 (Tex.Civ.App. 1977), *cert. denied*, 439 U.S. 822 (1978); *Hamilton v. Town of Valley Brook*, 487 P.2d 708

(Okl. 1971); *Jefferson v. Greater Anchorage Area Borough*, 451 P.2d 730 (Alaska 1969).

These decisions, and many of the cases cited in them, rest their holdings upon a ritual invocation of the doctrine of virtual representation. The courts frequently incorporate broad statements from previous decisions, without analysis of the facts of the cases to determine whether reliance is justified.

In some of the virtual representation cases, the government was a party to the earlier suit in which it represented the interests of its citizens. In such cases citizens were properly held to be bound by a judgment against the government. *See Equal Employment Opportunity Commission v. Datapoint Corp.*, 570 F.2d 1264, 1268 (5th Cir. 1978); *Southwest Airlines Co. v. Texas International Airlines, Inc. supra*, at 97-102; *New Castle County v. Sterling Properties, Inc.*, 379 A.2d 1125, 1127-1128 (Del. 1977). Cases of this type need not be commenced and conducted as representative actions because the government already has the legal authority to represent the interests of its citizens. *Restatement (Second) of Judgments*, § 85(1)(d), p. 56 (Tent. Draft No. 2, 1975).

On the other hand, citizens are not precluded by a judgment in an action by the government where the citizens' interests are not identical to that of the government. *Consumers Union of the United States, Inc. v. Consumer Product Safety Commission*, 590 F.2d 1209, 1217-1218 (D.C. Cir. 1978); *Restatement (Second) of Judgments, supra*, § 86 (1)(d), p. 70. Therefore this line of cases has no application to the situation where a citizen sues the government, because the citizen's interest necessarily differs from the government's.

There is another type of representative action in which a taxpayer may be precluded by a suit by another taxpayer involving the same issues. The courts have variously labeled these cases as "taxpayers' actions," "taxpayers' suits," or, as in the opinion below, "taxpayer lawsuits." 599 P.2d at 176. These cases, by definition, must be commenced and conducted by the plaintiff taxpayer for and on behalf of himself and all others similarly situated. 74 Am.Jur.2d, *Taxpayers' Actions,* §§ 1, 2 and 52; 46 Am.Jur.2d, *Judgments,* § 539. Furthermore, true taxpayers' actions always involve claims for equitable relief. *See* 74 Am.Jur.2d, *Taxpayers' Actions,* §§ 40-48. The fact that such relief, if obtained, will necessarily inure to the benefit of all other taxpayers has been one of the principal justifications for holding that all others should be bound if the first plaintiff is unsuccessful. *See, e.g., Blount v. City of Laramie,* 510 P.2d 294, 297 (Wyo. 1973).

In the case before the Court, the Supreme Court of Arizona has confused "an action by a taxpayer" solely for a refund of its own taxes, with a "taxpayer lawsuit" or a "taxpayers' action." Under Arizona law the most common types of true taxpayers' actions are proscribed by Ariz. Rev. Stat. § 42-204(B) (Supp. 1979), which absolutely prohibits any actions against the state or its political subdivisions to prevent the levy or collection of a tax.

Petitioner does not contend that all taxpayers' actions must be brought in Arizona pursuant to Rule 23 of the Arizona Rules of Civil Procedure, which is identical to the federal rule. There is a place for what might be called a true or common law "taxpayers' action," but these are still subject to the basic requisites of procedural due process, and must be brought pursuant to "procedures essen-

tially similar to a class suit though not denominated as such." *Restatement (Second) of Judgments, supra,* § 85, Comment e, p. 63.

The trend in the various states toward an unjustified application of the doctrine of virtual representation, the most recent of which is the case now before the Court, invites the issuance of the writ sought here, so that this Court may apply the rule set forth in *Hansberry*:

> "State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes." 311 U.S. at 40 (citation ommitted).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Arizona.

Respectfully submitted,

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